IN THE

SUPREME COURT OF THE STATE OF DELAWARE.

DOCKET NO. 32, 1970.

IN THE MATTER OF
FRANK A. LEVERING, DECEASED:

FRANCIS A. LEVERING, JR.,
PROPONDENT-APPELLANT BELOW,

Appellant,

v.

BLAIR S. LEVERING,
CONTESTANT, APPELLEE BELOW,

Appellee.

Petition for Re-Argument.

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PETITION FOR RE-ARGUMENT.

This Court in its opinion of September 23, 1970, in the above-captioned case, held that the Orphans' Court did not abuse its discretion by refusing to hear testimony by the subscribing witnesses of the contested will and cited in support thereof In Re *Collins*, Delaware, Super. 251 A. 2d 345, 1969.

The appellant contends that the refusal to hear live testimony by the subscribing witnesses is a denial of his rights to due process as guaranteed by the Delaware Constitution and the United States Constitution. Moreover, if the appellant's due process rights has not been violated, nevertheless, the Orphans' Court did not comply with the standards specified in *Collins'* case.

In Re *Collins*, *supra*, at page 347, quotes the following standard as to whether a trial de novo is to be the record or by live testimony:

> ". . . If the Court finds, after a review of a verbatim record, that the result below was clearly correct, it is justified in refusing an application for a fresh hearing of the evidence. If the decision below is not clearly correct, then this Court should hold a fresh hearing of the evidence."

The Orphan's Court failed to make a finding that the result below was "clearly correct" but simply stated in its opinion that it was refusing to hear the testimony of the subscribing witnesses because:

> "There was no indication that such presentation would differ in any material way from that presented below. Therefore, I declined to rehear any evidence in this case. Instead I reviewed the record in order to make de novo evaluation of the testimony."

The Court went on to hold that there was no "convincing evidence upon which a trier of fact could reasonably conclude that the testator had the requisite capacity to execute a will on June 15, 1968". Nevertheless, the Orphans' Court went on to state in its opinion that:

> "The only testimony that Mr. Levering was lucid at the time he executed the instrument came from the proponent, an interested party as sole beneficiary under the purported will, and the two witnesses to the instrument, one a social and business associate of the proponent who had never met or known the testator, and the other an aunt of the proponent's wife, who had not had occasion to visit and converse with the decedent for a couple of years prior to his hospitalization."

Clearly therefore the issue in the Orphans' Court was the credibility of the witnesses since there can be no doubt that there was testimony, at least by the two subscribing witnesses, that the testator did have the capacity to execute the said will. Since time immemorial, the issue of credibility has been based on a large extent on the demeanor of the witness. The cold printed transcript cannot begin to enlighten a trier of fact as to the credibility of a witness. Trials would be simple indeed if the trier of facts only had to review written records. The crucial issue in most cases is "who do you believe" and that task is a difficult task which cannot be justly performed without seeking and hearing the live witnesses. To do otherwise denies the appellant the right to a fair and just trial especially in a situation such as this where he is entitled by law to a "trial de novo".

In the instant case, the original trial was before a Register of Wills and not a judge. No matter how efficient or how conscientious the Register is, a trial before him

cannot rise to the level of a trial in the Superior or Orphans' Court. For example, in this case, the attorneys for both parties acted not only as attorneys but also as witnesses which is not only practically unheard of in the Superior Court but is discouraged, if not prohibited. Probably for this reason, the law provides for an appeal to the then Orphans' Court with a trial de novo; but in the instant case, the Appellant received what amounts to an appellate review rather than a new trial in the full sense of the word.

Consequently, the appellant is entitled to a new trial in which he would be afforded the opportunity to call live witnesses so that the court can see and hear the witnesses and reach a decision.

Consequently, the appellant seeks a re-argument on the issue of whether the refusal to hear the witnesses violated the appellant's due process rights and the standard set forth in the *Collins'* case.

Respectfully submitted,

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